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Mayor

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Zoning and Planning Action Date:	April 15, 2005
Board of Aldermen Action Date:	May 2, 2005
90-Day Expiration Date:	May 15, 2005

TO: Board of Aldermen
Planning and Development Board

FROM: Michael Kruse, Director of Planning and Development
Juris Alksnitis, Chief Zoning Code Official

SUBJECT: Petition # 237-01 of ALD. MANSFIELD proposing to amend Sections **30-1, 30-11, 30-12, and 30-13** to clarify the definitions of and specify the distinctions between restaurants, retail food establishments, fast food processing and preparation as allowed and permissive uses in Business, Manufacturing, and Mixed Use districts.

CC: Mayor David B. Cohen
Philip B. Herr, Chair, Comprehensive Planning Advisory Committee

RECOMMENDATION: *Hold pending further study while continuing work on an appropriate definition for retail food-serving establishments.*

The purpose of this memorandum is to provide the Board of Aldermen, Planning and Development Board, and the public with technical information and planning analysis which may be useful in the decision making process of the Boards. The Planning Department's intention is to provide a balanced view of the issues with the information it has at the time of the public hearing. There may be other information presented at or after the public hearing that the Zoning and Planning Committee of the Board of Aldermen will consider its discussion at a subsequent Working Session.

I. BACKGROUND

This petition was last discussed by the Zoning and Planning Committee at its meeting of March 29, 2004, at which time the item was held. Subsequently, the item was scheduled for public hearing February 15, 2005.

While the enclosed memorandum prepared by the Planning and Development Department provides an initial review and analysis of the petition, further study is needed.

II. EXISTING ORDINANCE AND PROPOSED AMENDMENT

The changes contemplated pursuant to this petition affect **Section 30-1, 30-11, 30-12, and 30-13** as they relate to the distinctions between restaurants, retail food establishments, fast food and drive-in establishments and regulation of such uses “as of right” and pursuant to special permit in Business, Limited Manufacturing, and Mixed Use districts.

Current text, Section 30-1

The Revised Zoning Ordinance (Zoning Ordinance) currently uses the following definitions.

Restaurant

An establishment where the principal activity is the service or sale of food or drink for on-premises consumption.

Fast food establishment

An establishment whose primary business is the sale of food for consumption on or off the premises which is:

- (a) primarily intended for immediate consumption rather than for the use as an ingredient or component of meals*
- (b) available upon a short waiting time; and*
- (c) packaged and or presented in such a manner that it can be readily eaten outside the premises where it is sold.*

Drive-in food service establishment

A fast food establishment which provides convenient vehicular access and may provide service to customers while in their vehicles.

The petition is worded to allow modification of one or more components of the Zoning Ordinance and to allow consideration as to what, if any, changes should be made that would better reflect the policies of the City of Newton with regard to the above uses and retail food-serving establishments.

III. EXISTING DEFINITIONS

A. General.

It appears that the existing use definitions for “restaurants”, “fast food establishments”, and “drive-in food service establishments were introduced into the Zoning Ordinance in October, 1974. These changes seem to have been prompted by an application for a victualler’s license for a McDonald’s establishment to be located in 330-334 Walnut Street in Newtonville and concern over related parking and traffic issues. In September of 1974, Petition #596-74 was filed by then Alderman Richmond to amend the Zoning Ordinance by creating the definitions and use regulations outlined above.

As a result, since 1974 the City of Newton has in effect sought to distinguish between so-called fast food establishments, i.e. food best known in association with and served by national chains such as McDonalds, Burger King, etc., and food perceived as having more of a retail character. City officials in 1974 could not have anticipated the increased popularity of prepared foods and the proliferation of food services offering ready-to-eat “take-out” food for immediate consumption on premises, or packaged hot and cold food selections for off premises consumption in vehicles or at-home meals available today.

The definition of “fast food establishment” was challenged in 1989 when the Commissioner of Inspectional Services (Commissioner) determined that the business known as “Chicken City” was in fact a fast food establishment as defined by Zoning Ordinance and not a retail food use. In response, the owners of Chicken City petitioned the Zoning Board of Appeals to overturn the decision of the Commissioner, which it did by vote of 5-0. (*ZBA Petition #21-89*).

Key arguments made by the appellant hinged on the time it took to cook and prepare the foods to be sold, and those foods were used as an ingredient or component of a meal. The ZBA agreed, noting in its decision that “the product is eaten at home, the food is not available immediately and the food is not packaged for immediate consumption.”

During the years subsequent to the appeal, numerous types and kinds of “take-out” food establishments have continued to appear in Newton. These have been permitted largely “as of right” in various commercial zones as retail food establishments, which to date have not been defined in the Zoning Ordinance.

B. Summary of Research

A survey of zoning regulations of six nearby communities shows that Newton’s current definition of fast food establishments is in line with these other communities, and in some cases is even more explicit. The definition of “drive-in food establishment” is also narrower than in nearby communities. With regard to “restaurant”, some communities seem to rely on customary understandings (unwritten) while others, such as Newton have a simple definition compared to a more complex definition utilized in Waltham. None of these communities had definitions for retail food establishments. For comparison of definitions used by neighboring communities see tables in *ATTACHMENT A- Comparison of Definitions* and for samples of definitions utilized elsewhere, see *ATTACHMENT B – Selected Restaurant Definitions* obtained from *A Planners Dictionary*, published by the American Planning Association.

III FOOD ESTABLISHMENTS IN NEWTON BY ZONING DISTRICT

As noted above, the Zoning Ordinance defines three primary categories of food uses: “restaurant”, “fast food establishment”, and “drive-in food service establishment”. These uses are allowed as of right or by special permit in most of the City’s commercial zones. Restaurants having 50 seats or less are allowed as of right in BU 1-4 and MU-2 zones, while larger restaurants are allowed subject to special permit in BU1-4, MU-1 & 2, and LM zones. However, “fast food” and “drive-in” establishments are only allowed in BU-2 and LM zones and require a special permit. Also see the Planning Department memorandum (*RE: Petition #238-01*) for discussion and analysis of issues and considerations pertaining to “drive-in food service establishment” and “fast food establishment” type businesses.

In addition, the Zoning Ordinance defines “drive-in business” as follows:

A retail or consumer use of land or a building in which all or part of the business transacted is conducted by a customer from within a motor vehicle.

This use, which may include a range of food and non-food retail uses, is available by special permit in the BU1-4 and LM zones. In BU1-4 zones Section 30-11(d)(10) provides a special permit option for an accessory “drive-in” type operation for all uses allowed as of right pursuant to Section 30-11(a). This includes retail stores, restaurants having 50 or fewer seats, and retail bakeries. For a summary of food uses and applicable zones, see the table in *ATTACHMENT C - Food Related Uses by Zoning District*.

IV ANALYSIS

The subject Petition #237-01 seeks to review and clarify selected definitions in the Zoning Ordinance pertaining to retail food-serving businesses. As previously discussed in Sections I - III, above, the City has a set of definitions pertaining to restaurants, fast food establishments, and drive-in establishments, but no definition pertaining to “retail food service” or “retail food establishment”. Hereafter the general term “retail food-serving establishment” will be employed. In addition, the Licensing Board also exercises regulatory authority in this area.

Licensing Board

Information obtained from the Licensing Board indicates a license is required for the following:

Common Victualler- the keeper of a restaurant or public eating house where the food sold is eaten on the premises and the keeper of a food service business where food is sold, served, dispenses, distributed, or delivered to the public irrespective of whether or not the food is eaten on the premises.

This also applies to retail food-serving establishments, which sell food prepared for eating on or off premises, such as grocery store kitchen food service, and other “take-out” type establishments.

For the purposes of the Licensing Board, a restaurant is defined as follows, without regard to seating capacity:

Restaurant- space, in a suitable building, leased or rented or owned by a person holding a duly issued and valid license as a common victualler under the provisions of M.G.L. c.140, and provided with adequate and sanitary kitchen and dining room equipment and capacity for preparing, cooking, and serving suitable food for strangers, travelers and other patrons and customers, and in addition meeting and complying with all the requirements imposed upon common victuallers under M.G.L. c. 140

In 2004, a total of nine businesses applied for licensing as a common victualler (no alcohol served). Several of these are retail food-serving establishments located in Newton Centre, while one such establishment recently located in Newtonville. For additional information see ***ATTACHMENT D - Summary of Requests to Licensing Board***. These were new applications, not a renewal or transfer, meaning that the previous use did not have a victualler’s license that could be transferred. Businesses with an existing license must go through a renewal process each November. None of these nine businesses came before the Board of Aldermen for a special permit. The Licensing Board monitors approximately 225 victualler licenses in the City of Newton and has not noticed a particular increase or decrease in the last several years.

Retail food-serving businesses

While restaurants, fast food establishments and drive-in establishments are subject to Zoning Ordinance requirements, “retail food-serving establishments” are not defined, yet are permitted “as of right” as a retail sales use. As noted above, these establishments may at the present time also seek approval through the special permit process for accessory “drive-in” operations.

Difficulties typically arise in determining the character of such establishments, and their distinguishing aspects in relation to other retail food businesses. Moreover, when a retail food-serving business starting out modest in size and scope seeks to grow, it may take on characteristics more similar to a restaurant.

Wing House, the current retail food take-out establishment located at Farwell Street/North Street illustrates this pattern. Originally this store location was approved in 1992 as a retail food establishment with 9 seats maximum by then Zoning Administrator Harold Hewett. However, over time the businesses at this location apparently were concurrently licensed by the Licensing Board for 19 seats. The current establishment has recently increased its capacity to 18 seats. With the significantly larger number of seats this food establishment changes in character as it now provides for significant sit-down food service with on-premises consumption, thereby becoming more similar to a restaurant. These issues are currently before the Board as part of Petition #471-04 which seeks a special permit and amendment of prior Board Order #278-90 for several matters pertaining to the overall site where this establishment is located. It should also be noted that when seating capacity is increased, additional parking is required pursuant to Section 30-19(d)(13) for a restaurant use.

Over the years a wide range of food-serving retail businesses other than restaurants have emerged, faded out, or evolved over time. Drug store and dime store food counters, vending machine eateries, pizza take-out establishments, cafeteria type businesses, doughnut shops, and ice cream parlors are well known. Today we are witnessing the emergence of many different kinds of “take-out” food establishments marketing coffee, tea, sushi, salad bars, bagels, sandwiches, subs, burritos and wraps, soups, chicken wings, and supermarket prepared food counters, many of which have a presence within the City of Newton. An initial review of common characteristics suggests the following groupings:

1. Establishments where the principal service is “take-out” type food for off-premises consumption
 - Order is placed at counter or by phone
 - Floor plan is designed primarily for food preparation, packaging and retailing,
 - Food is pre-packaged cold for consumption off premises
 - Food is prepared warm and packaged for consumption off premises
 - No wait staff – customer does self service
 - Customer receives food at counter and leaves premises
 - Minimal seating/counter available for incidental customer use
2. Establishments where the principal service is “take-out” type food along with “eat-in” accommodations
 - Order is placed at counter or by phone
 - Floor plan has area designated for food preparation and retailing
 - Floor plan also has significant area designated for on-premises eating
 - Food is packaged cold for on or off-premises consumption
 - Food is prepared warm for on or off-premises consumption
 - No wait staff – customer does self service
 - Customer receives food at counter and may elect to leave or stay
 - Significant seating available for customer use (chairs, tables, couches, etc.)

In addition, “take-out” service may be available at restaurants where such service is accessory to the restaurant and not the principal operation. In such case, the restaurant remains the primary use and would be regulated under the restaurant category.

While many retail food service establishments are located throughout the City in various commercial zones, no study is available which summarizes the specific types, locations, patterns, and impacts of such establishments. For example, it is noted that a number of retail food-serving

establishments can be found in the Mixed Use District 1 on Needham Street, an area where restaurants are allowed only by special permit and subject to minimum building size.

Absent a survey and study of existing retail food-serving establishment patterns within Newton, it is difficult to assess the impacts of such businesses. Such an assessment would be key in determining the extent to which such businesses require regulation under the Zoning Ordinance. This should facilitate a determination regarding the appropriate level of permitting oversight -- whether “as of right” or by special permit and a determination as to which zones are best suited for such establishments. As part of this process it will be important to develop threshold criteria to distinguish between “take-out” establishments with significant on-premises consumption and restaurants so as to provide a workable guideline for determining when such establishments change character to, or may in fact be a restaurant type use. For example, factors such as volume and sales of foods consumed both on and off premises merit review and consideration. Finally, it will be necessary to develop workable parking requirements applicable to retail food-serving establishment type uses.

V. SUMMARY AND RECOMMENDATIONS

During the years subsequent to the Zoning Board of Appeal ruling (ZBA #21-89) in 1989 overturning the Commissioner’s determination regarding the application of the “fast food establishment” definition, numerous types and kinds of “take-out” food establishments have continued to appear in Newton. These have been permitted largely “as of right” in various commercial zones as retail food-serving establishments, which to date have not defined, yet are permitted “as of right” without further regulation under the Zoning Ordinance.

An initial review of common characteristics of retail food-serving establishments suggests two groupings:

1. Establishments where the principal service is “take-out” type food for off-premises consumption.
2. Establishments where the principal service is “take-out” type food along with “eat-in” accommodations

While these types of establishments have emerged throughout the City, no survey or study is currently available providing an overview of business patterns or assessment of related impacts. As a result, the Planning Department believes it is premature to recommend any amendments to Sections 30-11, 30-12, and 30-13. However, Planning Department staff is prepared to work with the Zoning and Planning Committee and with the Law Department in developing a suitable definition for retail food-serving establishments for incorporation in Section 30-1, Definitions.

Recommendation: *Hold pending further study while continuing work on an appropriate definition for retail food- serving establishments.*

ATTACHMENTS

Attachment A - Comparison of Definitions

Attachment B - Selected Restaurant Definitions

Attachment C – Food Related Uses by Zoning District

Attachment D – Summary of Requests to Licensing Board

ATTACHMENT A – COMPARISON OF DEFINITIONS

Definitions of Fast Food Establishments	
Newton	An establishment whose primary business is the sale of food for consumption on or off the premises which is: (a) primarily intended for immediate consumption rather than for the use as an ingredient or component of meals (b) available upon a short waiting time; and (c) packaged and or presented in such a manner that it can be readily eaten outside the premises where it is sold.
Watertown	Any place or premises used for sale, dispensing, or serving of food, refreshments or beverages where: The primary business of the establishment is the sale of said items which are packaged or presented in Such a manner that they can be readily eaten outside the building where it is sold.
Waltham	Any establishment, except for those that are licensed to serve alcoholic beverages, where that portion of floor space designated to be used for activities related to food preparation exceeds 25% of the total floor area of that story level of the establishment used for such food preparation; or in which the total table seating provided is less than 50 seats; or that includes drive-in customer service facilities; or where the primary business of the establishment is the sale of food or drink prepared in advance of the customer's order or the preparation of quick order food upon direct instructions to personnel at a counter rather than at individual tables and which food is packaged or presented in such a manner that it can be readily consumed within the structure, upon the associated grounds, in a motor vehicle or elsewhere. For the purposes of this chapter, activities related to food preparation shall include but shall not be limited to any space used for the storage of food, for the operation of a salad bar or for serving food to customers. [Amended 5-12-1986 by Ord. No. 25929; 8-1-1994 by Ord. No. 27790; 4-24-2000 by Ord. No. 28983]
Cambridge	<p>Fast Order Food Food which is (a) primarily intended for immediate consumption rather than for use as an ingredient in or component of meals; (b) available upon a short waiting time; and (c) packaged or presented in such a manner that it can be readily eaten outside the premises where it is sold.</p> <p>Fast Order Food Establishment A specific operation separate and distinct from any other operation in the location occupied and in the kind of Fast Order Food sold, and which: IV. has as its primary business the sale to the public of Fast Order Food for consumption on or off the premises, and (b) does not meet all of the following conditions: V. provision of nondisposable plates, cups and utensils to all patrons, (2) availability of printed individual menus for all patrons, (3) provision of seventy-five (75) percent of the seating in the premises at free standing tables, rather than at counters, and (4) at least eighty (80) percent of the revenues from food sales is attributable to food consumed on premises.</p>

ATTACHMENT A – COMPARISON OF DEFINITIONS (Cont.)

Definitions of Drive-in Food Service Establishments	
Newton	A fast food establishment which provides convenient vehicular access and may provide service to customers while in their vehicles.
Watertown	Any premises used for the sale, dispensing or serving of food, refreshments, or beverages in automobiles, including those establishments where customers may serve themselves and may consume the food, refreshments or beverages on the premises, when received through a service window.
Waltham	Business establishments that are designed to allow customers to access sales or services without leaving their motor vehicles, including but not limited to automated banking facilities, drive-up dry cleaning services, drive-up food service windows or similar customer services. Further, for the purposes of this chapter, restaurants whose primary function is the provision of food for consumption off the premises shall be considered a drive-in customer service.
Cambridge	None

Definitions of Restaurant	
Newton	An establishment where the principal activity is the service or sale of food or drink for on-premises consumption
Watertown	None
Waltham	Eating places, including membership clubs and establishments, which may be licensed to serve alcoholic beverages and whose primary method of serving food is at tables, booths or counters serviced by waiters and waitresses and whose primary business is the sale and preparation of food to be consumed on the premises. Catering establishments whose primary activity is wholesale preparation of food to be consumed off the premises shall not be considered restaurants.
Cambridge	None

ATTACHMENT B – SELECTED RESTAURANT DEFINITIONS

Source: A Planners Dictionary, APA, April 2004

See Planning Dept for Attachment B.

ATTACHMENT C – FOOD RELATED USES BY ZONING DISTRICT

City of Newton Revised Zoning Ordinance Food Related Uses	Zoning Districts	
	Allowed as of Right	By Special Permit
RETAIL FOOD-SERVING ESTABLISHMENT* A business that sells ready-to-eat “take-out” type food. Consumption may be on or off premises. *Currently perceived as “retail food establishment.” Possible new use category under review. <u>NOTE:</u> See districts where uses related to retail food services are currently permitted. There is no study that tells us the business patterns or zoning districts where such retail food services currently exist.	Business 1-4 - Retail Store, Bakery Mixed Use 2 - Retail Store, Bakery Limited Manufacturing – Retail Store, Commercial or Wholesale Bakery	Business 1-4 – Retail Store with accessory “drive-in” Mixed Use 1 - Retail Store , provided that a freestanding retail structure shall contain a minimum of 5,000 square feet of gross floor area. This is the only instance where a use related to retail food service is further regulated with a special permit. Limited Manufacturing – Pastry shop, coffee shop, Manufacturing –Commercial or Wholesale Bakery
Restaurant An establishment where the principal activity is the service or sale of food or drink for on-premises consumption	BU1-4 , Restaurants having not more than 50 seats which are not open between the hours of 11:30 p.m. and 6 am and further provided that such restaurants are not fast food establishments MU2 Restaurants having not more than 50 seats	BU1-4 , Restaurants having over 50 seats and which are not opened between the hours of 11:30 p.m. and 6 am, except that such restriction as to time shall not apply to a hotel or motel restaurant; and businesses LM , Restaurant, fast food, drive-in food service, or other such establishment when dispensing food products between 10:30 p.m. and 6 a.m. MU-1 Restaurants which hold a victuallers license, provided that a freestanding restaurant or business shall contain a minimum 5,000 sq.ft. gross floor area. MU-2 Restaurants over 50 seats and such businesses, which hold Victuallers, license.

ATTACHMENT C – FOOD RELATED USES BY ZONING DISTRICT (Cont.)

City of Newton Revised Zoning Ordinance Food Related Uses	Zoning Districts	
	Allowed as of Right	By Special Permit
Fast Food Establishment An establishment whose primary business is the sale of food for consumption on or off the premises which is: (e) primarily intended for immediate consumption rather than for the use as an ingredient or component of meals (f) available upon a short waiting time; and (g) packaged and or presented in such a manner that it can be readily eaten outside the premises where it is sold.		BU-2 , Fast food establishment, drive-in food establishment LM , Fast food establishment, drive-in food service establishment
Drive-in Food Service Establishment A fast food establishment which provides convenient vehicular access and may provide service to customers while in their vehicles.		BU-2 , Fast food establishment, drive-in food establishment LM , Fast food establishment, drive-in food service establishment
Drive-in business A retail or consumer use of land or a building in which all or part of the business transacted is conducted by a customer from within a motor vehicle.		BU1-4 , Drive-in or open-air business and appurtenant buildings or structures, or a drive-in business as part of any building or land use for the purposes authorized by section – 11(a) LM Drive-in or open-air businesses and appurtenant building or structures

ATTACHMENT D – SUMMARY OF REQUESTS TO LICENSING BOARD

2004 Licensing Board Requests and Approvals			
Address	Name	License	Zoning District
1229 Centre Street Newton Centre	Picasso	Common Victualler	B1
5352 Union Street Newton Centre	St. Petersburg	Common Victualler	B1
300 Boylston St. Atrium Mall	Surreal Image Café	Common Victualler	B1
551 Commonwealth Newton Centre	Bodiani Bakers (upgrade from previous business, not a new location)	Common Victualler	MR1
119 Centre Street Newton Centre	Tango Mango	Common Victualler	B1
216 Sumner Street Newton Centre	Asian Wings	Common Victualler	B1
276 Church St. YMCA	Caffe Appassionato	Common Victualler	MR1
1185 Centre Street Newton Centre	Subway	Common Victualler	B1
108 Madison Newtonville	Basil Tree	Common Victualler	B1